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Supreme Court, U.S.
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No. 02-1581

IN THE
Supreme Court of the United States

FORD T. JOHNSON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ERNEST P. FRANCIS
Counsel of Record
ERNEST P. FRANCIS, LTD.
1655 North Fort Myer Drive
Suite 700
Arlington, Virginia 22209
(703) 683-5696

Counsel for Petitioner

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In response to the Brief for the United States in Opposition ("Brief in Opposition"), Petitioner Ford T. Johnson, Jr. ("Johnson") takes exception on two grounds to the arguments of the United States ("Government"). First, the Government has mischaracterized the facts of this case through a conveniently selective and misleading presentation. Second, the facts of this case are not sufficient to preclude Johnson from establishing reasonable cause that would vitiate any inference of willfulness that might arise from the Government's evidence at bar.

1. Mischaracterization of Facts By the Government

The Government's presentation of the instant case as one in which Johnson made a "conscious decision" to pay creditors instead of the Internal Revenue Service ("IRS") is a distortion of the record. The Government argues that Johnson's "company was frequently delinquent in paying over to the government the taxes that it withheld from its employees' wages." Brief in Opposition at 2. As reflected in the page included in the Appendix hereto from the Government's reply memorandum in the District Court below, the Government acknowledged that it did not know of any delinquencies by the company prior to the three quarters at issue in the instant case.

In its Brief in Opposition, the Government does not contend that Johnson ever wrote a single check to any creditor during the period in which the Government contends that he acted willfully, and thus the instant case is distinguishable from that of *Plett v. United States*, 185 F.3d 216 (4th Cir. 1999), in which the corporate officer who was liable for withholding taxes did write checks. Instead the objective facts in this case reflect a situation in which Johnson delegated responsibility to the chief financial officer of the company, Laurence Morrison ("Morrison"), for payment of all the company's obligations, including that of tax payment. There is not a shred of evidence that Johnson directed Morrison not to make withholding tax payments to

the IRS. Indeed when Johnson learned that Morrison had not made the required tax payments, he took a number of steps to correct the situation. At first he supervised this individual directly, then he had the company's legal counsel do so. He also negotiated payment plans with the IRS to resolve the situation.

The Government's contention is not that Johnson did nothing to supervise this individual but that he did not do enough. In no context other than that of 26 U.S.C. § 6672(a) (2001) would anyone ever conclude that this factual situation - of at most arguably deficient supervision - rises to the level of willfullness. *See Smith v. First Union Nat'l Bank*, 202 F.2d 234, 249-50 (4th Cir. 2000) (knowledge of employee's incompetence creates liability for negligent supervision or retention), *Norman v. Southern Guaranty Ins. Co.*, 191 F. Supp. 2d 1321, 1337 (M.D. Ala. 2002) (same). While the desire to insure the payment of taxes is noble, that objective cannot be accomplished by a tortured construction of statutory language to convert at worst negligent conduct into willful conduct. This is precisely why the court in *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997), construed § 6672(a) as allowing a corporate officer to escape liability under that section through a showing of "reasonable cause".

The actions that the Government repeatedly describes as "juggling" are more appropriately described as cash management by which Johnson insured that his company remained current in its payment of withholding taxes for the twenty five year period during which Johnson's company was in existence prior to the three quarters for which the Government seeks to recover the penalty at issue herein from Johnson. Indeed the Government admits that it cannot identify a single quarter in which Johnson's company was delinquent on withholding taxes prior to the three quarters at bar. It was only when the government refused to pay its debts to Johnson's company that

Johnson's company was unable to pay its debts to the Government.

2. Conflict Between the Circuits as to Whether Actual Intent of a Corporate Officer Determines Willfulness

The Government in its Brief in Opposition now attempts to mask the conflict between the circuits on the question of whether reasonable cause, established through evidence of a corporate officer's actual intent, can preclude a finding of willfulness under § 6672(a). The court in *Finley* was of the opinion that the Government's position, under which willfulness is established on the basis of objective factors without regard to actual intent, was contrary to the plain meaning of the statutory language. In its brief before the Fourth Circuit in this case, the Government argued that *Finley* was wrongly decided and provided reasons in support of that contention. The Government explicitly invited that court to reject the reasonable cause defense and follow the "prior, better reasoned, decisions by the First, Seventh, and Ninth Circuits." The Government's argument that *Finley* was wrongly decided is reflected in the pages included in the Appendix hereto from the Government's brief in the Fourth Circuit in this case.

Accordingly, the Government's argument (Brief in Opposition at 8) that "neither the district court nor the court of appeals addressed any such claim" that Johnson had reasonable cause is false. As reflected in the Government's own filing before the Fourth Circuit, the issue was plainly presented. The court below accepted the Government's argument that they should not follow *Finley*. The Fourth Circuit's improvident election to proceed by

summary decision in a case that presents an inter-circuit conflict does not eliminate the conflict.[1]

The Government's argument now attempts to minimize the conflict between the circuits by arguing that *Finley* would not dictate a different result in the instant case. The Government argues that *Finley* is "obviously distinguishable" from the case at bar because in *Finley* "the responsible person delivered funds to his bank and directed that they be applied to withholding taxes, but the bank refused to do so." Brief in Opposition at 10 n. 3. The Government's argument appears to be that the facts of the case in *Finley* supported a finding of "reasonable cause" in that case.

In fact this was precisely what the court in *Finley* stated that it was *not* deciding. The issue in *Finley* was whether the district court in that case had properly granted judgment as a matter of law in favor of the government following a jury verdict in favor of the corporate officer. The court in *Finley* stated that its decision was not to simply reinstate the jury verdict on the ground that the verdict was supported by substantial evidence. 123 F.3d at 1349. The court instead noted that it was not deciding that "reasonable cause" was present in that case but only that the jury should resolve the issue after having been properly

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[1] The Fourth Circuit's decision to summarily decide this case is in sharp contrast to the Eleventh Circuit's contemporaneous treatment of a case involving application of the reasonable cause defense; the court in that case issued not only an initial published opinion but one on rehearing also. *Thosteson v. United States*, 304 F.2d 1312 (11th Cir. 2002), *aff'd on reh'g*, No. 01-14520, 2003 WL 21254887 (11th Cir. June 3, 2003). In any event, the Fourth Circuit's citation in its summary opinion of the docket number for the District Court's opinion rather than the Federal Supplement citation for that opinion - even though the Federal Supplement citation was included in Johnson's reply brief in the court below - presents the question of the extent to which the judges deciding the case below even read the briefs.

instructed concerning the controlling law on what constitutes willfulness. *Id.*

Similarly Johnson is entitled to have his case decided under the correct legal principles as decided by this Court. This Court must decide whether *Finley* or the decisions of the First, Seventh, Eighth, and Ninth Circuits are better reasoned. It is not surprising that the Government wants to avoid resolution of this conflict because a decision by this Court that *Finley* was properly decided would put in jeopardy the Government's virtually automatic right to summary judgment in cases in which it seeks recovery of the penalty under § 6672(a). The proper disposition of the instant case is not to affirm the Fourth Circuit on the basis of a standard that it did not apply, but rather to remand the case to the Fourth Circuit so that it can apply the governing statute as correctly interpreted. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986) (case remanded when court of appeals had applied erroneous standard of absolute liability regardless of circumstances), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (case remanded for court of appeals to apply changed rule announced by Court).

The Government's discussion of the decision in *Finley* does not accurately present the content of that decision. The Government interprets *Finley* as teaching that a decision to allow payment to creditors rather than the IRS precludes any showing of reasonable cause irrespective of what the corporate officer might prove to establish reasonable cause. Brief in Opposition at 9-10. The entire thrust of *Finley* is that a person may still establish reasonable cause in those cases in which the facts would (under the decisions in other circuits) establish wilfulness as a matter of law (and therefore entitle the Government to summary judgment). The court in *Finley* stated that even when the corporate officer knows of a withholding tax delinquency and fails to personally fulfill his duty to ensure

payment of the delinquent taxes, he or she still has "the opportunity to demonstrate to a jury there was reasonable cause sufficient to excuse the failure to pay the withholding taxes". 123 F.3d at 1348. Indeed, the court in *Finley* described the facts in the instant case, which involves "[r]eliance upon the representation of someone in control of company finances that withholding taxes will be paid after learning that such taxes are delinquent, and when it is known that the person making the statements is unreliable and has inadequately performed his financial responsibilities in the past", as a paradigm that some courts have identified as supporting a finding of willfulness as matter of law. 123 F.3d at 1345. While under the Government's position such a showing would be the end of the story, *Finley* instructs that those facts are merely the beginning of the story, and that the corporate officer still has the opportunity to establish reasonable cause notwithstanding such a showing by the Government. Accordingly, the Government's position that the facts at bar preclude any showing of reasonable cause - regardless of Johnson's proof in support of reasonable cause - is simply not consistent with *Finley*.

Johnson, therefore, asks that this Court resolve the conflict between *Finley* and the contrary decisions of other circuits so that his case may be decided under the right construction of the language of § 6672(a). Accordingly, the Court should grant his petition for certiorari.

Respectfully submitted,

ERNEST P. FRANCIS
Counsel of Record
ERNEST P. FRANCIS, LTD.
1655 North Fort Myer Drive
Suite 700
Arlington, Virginia 22209
(703) 683-5696

Counsel for Petitioner